APPEAL NO. 120313
FILED APRIL 16, 2012

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on January 23, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The three disputed issues certified out of the benefit review conference held September 9, 2011, were: (1) does the [date of injury], compensable injury extend to depression, lumbar sprain/strain, lumbar herniated nucleus pulposus (HNP) at L4-5 and L5-S1, cervical sprain/strain, cervical HNP at C6-7, and disc bulge at C5-6? (2) did the claimant have disability from February 9, 2010, through July 8, 2011, resulting from the [date of injury], compensable injury? and (3) what is the appellant's (claimant) average weekly wage (AWW)? The hearing officer resolved the disputed extent of injury and disability issues by deciding that the claimant's compensable injury of [date of injury], does not extend to depression, lumbar and cervical sprain/strains, herniated discs at the L4-5, L5-S1, and C6-7 levels, and a disc bulge at the C5-6 level and that the claimant sustained disability from February 9, 2010, through June 1, 2011, but not from June 2 through July 8, 2011. On the record at the CCH, the parties agreed that the claimant's AWW is $1,253.56 prior to February 6, 2011, and upon termination of the claimant's fringe benefits on February 6, 2011, and thereafter, the claimant's AWW is $1,650.14. The hearing officer failed to reference the parties' agreement or to make any finding of fact or conclusion of law in her decision regarding the AWW.

The claimant appealed, contending that the hearing officer erred in not listing the AWW as a disputed issue and in failing to make a determination in accordance with the parties' agreement on that issue. The claimant further appealed the hearing officer's extent-of-injury determination, contending that the evidence established the claimed extent-of-injury conditions/diagnoses were part of the compensable injury, and the hearing officer's determination that the claimant did not sustain disability from June 2 through July 8, 2011, contending that the adverse determination on disability was arbitrary and not supported by the evidence. The respondent (carrier) responded, urging affirmance of the disputed determinations and contending that "the hearing officer did not err in not including a reference to a stipulation on [AWW] in the decision and order."

The hearing officer's determination that the claimant sustained disability from February 9, 2010, through June 1, 2011, was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified at the CCH that on [date of injury], he was working as a delivery specialist/driver of a tanker truck. On the date of injury, while attempting to tighten up a leak on top of the tanker, a pressurized lid blew off, striking the claimant and throwing him back into a hand rail. The claimant testified that he hurt his low back and neck at work and that, prior to this date, had never had a low back or neck injury. The carrier contended that the claimant's compensable injury is limited to cervical and lumbar contusions.

DESIGNATED DOCTOR

Section 408.0041(a) provides in pertinent part that at the request of an insurance carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve any question about: (3) the extent of the employee's compensable injury; and (5) the ability of the employee to return to work [(RTW)]. Section 408.0041(e) provides, in part, that the report of the designated doctor has presumptive weight unless the preponderance of the evidence is to the contrary. 28 TEX. ADMIN. CODE § 127.1(a) (Rule 127.1(a)) provides in part that [a]t the request of the insurance carrier, an injured employee, the injured employee's representative, or on its own motion, the [Texas Department of Insurance, Division of Workers' Compensation (Division)] may order a medical examination by a designated doctor to resolve questions about the following: (3) the extent of the injured employee's compensable injury; and (5) the ability of the injured employee to [RTW].

EXTENT OF INJURY

In her Discussion section of her decision, the hearing officer stated:

A fair reading of the reports of [Drs. I] and [Dr. A], the designated doctor and [c]arrier-retained doctor, respectively, does indicate that the claim injury may include the pathology alleged. However, applicable precedent dictates that a causal relationship must be proven through the use of detailed expert medical evidence, and these reports fall far short of that strict standard. As the reports of other doctors are no more probative than those referenced, this issue must be resolved in [c]arrier's favor.

Because of conflicting medical evidence and/or lack of persuasiveness of the expert medical evidence regarding a causal connection between the claimed condition and the work injury, as found by the hearing officer, that portion of the hearing officer's determination that the claimant's compensable injury of [date of injury], does not extend

to depression, herniated discs at the L4-5, L5-S1, and C6-7 levels, and a disc bulge at the C5-6 level is supported by sufficient evidence and is affirmed.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We note that the Appeals Panel has declined to hold expert medical evidence was required to prove a back strain. Appeals Panel Decision (APD) APD 952129, decided January 31, 1996. We also note that the Appeals Panel has long rejected the contention that a shoulder strain requires expert medical evidence. APD 992946, decided February 14, 2000.

The evidence established that the claimant was initially evaluated and treated at [Medical Center] on February 9, 2010. In a [Medical Center] medical report dated February 9, 2010, the doctor recorded the mechanism of injury (consistent with the claimant's testimony at the CCH) and included in the claimant's diagnoses "[c]ervical [s]prain/[s]train . . . [l]umbar [s]prain/[s]train . . ." and recommended medication and diagnostic testing. Cervical and lumbar sprain/strains were diagnosed in the [Medical Center] medical records dated from February 10 through March 15, 2010.

Dr. I was appointed by the Division to address maximum medical improvement (MMI), impairment rating (IR), extent of injury, and the claimant's ability to RTW.

Dr. I initially examined the claimant on March 25, 2011, and certified that the claimant had not reached MMI but was expected to reach MMI on July 25, 2011. This examination was only for the purposes of MMI and IR. Dr. I included in his narrative report dated March 25, 2011, that the claimant's diagnoses were "1. [p]aresthesias of cervical and lumbar strain. 2. C6-7 and L4-5 and S1 disc disease." Dr. I re-examined the claimant on July 8, 2011, to determine MMI, IR, extent of injury and RTW. In his narrative report, under the extent of injury section, Dr. I stated:

It is my opinion that, after review of the medical records presented and a thorough examination, the extent of the [claimant's] compensable injury would be cervical strain and lumbar strain with exacerbation of pre-existing degenerative disc disease."

In his certification of MMI and IR, Dr. I certified that the claimant reached MMI on July 8, 2011, with 10% IR, placing the claimant in Diagnosis-Related Estimates (DRE)

Lumbosacral Category II: Minor Impairment (5%) and in DRE Cervicothoracic Category II: Minor Impairment (5%).

Dr. I's extent of injury opinion as the designated doctor that the compensable injury included cervical and lumbar sprain/strains is supported not only by the initial [Medical Center] medical records in evidence but by the peer review report dated February 18, 2011, by the carrier-selected doctor, [Dr. B] in which Dr. B stated, "[b]ased on the mechanism of injury and the medical records provided, the claimant had a strain of his cervical and/or lumbar spine with a contusion to his lumbar spine." Dr. A, a post-designated doctor required medical examination doctor, in a report dated May 12, 2011, although approved to address MMI and IR, included under the claimant's diagnoses, cervical and lumbar strains. Further, [Dr. K], who became the claimant's treating doctor after [Medical Center], diagnosed cervical and lumbar pain, and eventually, cervical and lumbar intervertebral disks, documenting restricted range of motion for the cervical and lumbar spine. Under the facts of this case, with the described mechanism of injury, we decline to hold expert medical evidence was required to prove cervical and lumbar sprain/strains.

The preponderance of the evidence is not contrary to the designated doctor's opinion that the claimant's compensable injury of [date of injury], extends to cervical and lumbar sprain/strains. That portion of the hearing officer's Finding of Fact No. 7 that "[the] [c]laimant's compensable injury of [date of injury], did not cause him to sustain or aggravate . . . lumbar and cervical sprain/strains . . ." is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Accordingly, we reverse that portion of the hearing officer's determination that the claimant's compensable injury of [date of injury], does not extend to lumbar and cervical sprain/strains and render a new decision that the claimant's compensable injury of [date of injury], does extend to lumbar and cervical sprain/strains.

AWW

The hearing officer erred in failing to address the AWW issue as stated in the benefit review conference report. Accordingly, we reverse the hearing officer's decision as being incomplete. Because the parties agreed on the record and resolved the AWW issue, we render a new decision that on or before February 6, 2011, the claimant's AWW is $1,253.56, and thereafter, the claimant's AWW is $1,650.14.

DISABILITY

Dr. I, the designated doctor appointed on RTW, following his July 8, 2011, examination, opined that the claimant's compensable injury included cervical and lumbar sprain/strains, and also opined that the claimant was released to sedentary work with restrictions of no kneeling/squatting, no bending/stooping, no twisting, no lifting/carrying objects more than 5 pounds for the period of February 9, 2010, through June 1, 2011. The claimant testified that he had not been released to full duty nor could he have done his pre-injury job duties for the period from June 2 through July 8, 2011. Although we have rendered a new decision on the extent of the claimant's condition, the designated doctor did consider cervical and lumbar sprain/strains when, in his report dated July 8, 2011, Dr. I only restricted the claimant's work status through June 1, 2011. Therefore, the hearing officer's determination that the claimant did not sustain disability from June 2 through July 8, 2011, is supported by sufficient evidence and is affirmed.

SUMMARY

We affirm that portion of the hearing officer's determination that the claimant's compensable injury of [date of injury], does not extend to depression, herniated discs at the L4-5, L5-S1, and C6-7 levels, and a disc bulge at the C5-6 level.

We reverse that portion of the hearing officer's determination that the claimant's compensable injury of [date of injury], does not extend to cervical and lumbar sprain/strains and render a new decision that the claimant's compensable injury of [date of injury], does extend to cervical and lumbar sprain/strains.

We reverse the hearing officer's decision as being incomplete and render a new decision that on or before February 6, 2011, the claimant's AWW is $1,253.56, and thereafter, the claimant's AWW is $1,650.14.

We affirm the hearing officer's determination that the claimant did not sustain disability from June 2 through July 8, 2011.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

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Margaret L. Turner
Appeals Judge